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No. 09-1121

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In The
Supreme Court of the United States

J. MICHAEL BROWN, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, JANIE P. MILLER, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, and KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.,

Petitioners,

v.

ALICIA PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, and ELWOOD STURTEVANT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

REPLY BRIEF FOR THE PETITIONERS..... 1

A. The Petition presents two compelling questions that, when answered, will ensure uniform State taxpayer standing requirements in Establishment Clause cases across all circuits 2

B. The Questions Presented reflect significant circuit conflicts 4

C. Important Article III and First Amendment considerations support applying the *Flast* "legislative enactment" nexus test to State taxpayers 8

D. The Questions Presented merit the Court's prompt review 12

TABLE OF AUTHORITIES

Page

CASES:

Am. United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007) 6, 7, 8

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 5

DaimlerChrysler v. Cuno, 546 U.S. 342 (2006) 1, 6, 9, 11, 13

Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*

Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007) ..... *passim*

Hinrichs v. Speaker of the House of Representatives of the Indiana Gen. Assembly, 506 F.3d 584 (7th Cir. 2007) ..... *passim*

Horne v. Flores, 129 S.Ct. 2579 (2009) 9

Johnson v. Econ. Dev. Corp. of the County of Oakland, 241 F.3d 501 (6th Cir. 2001) 2

Marsh v. Chambers, 463 U.S. 783 (1983) 9

Pedreira v. Ky. Baptist Homes for Children, Inc., 579 F.3d 722 (6th Cir. 2009) 7

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 12, 13

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1988) 12, 13

U.S. v. Mitten, 592 F.3d 767 (7th Cir. 2010) 5

U.S. v. Walton, 255 F.3d 437 (7th Cir. 2001) 5

TABLE OF AUTHORITIES – Continued

Page

Valley Forge Christian College v. Am. United for Separation of Church and State, 454 U.S. 464 (1982) 11

Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002 (9th Cir. 2009) 13

CONSTITUTIONS:

U.S. Const.:

Art. III ..... *passim*

Amend. I (Establishment Clause) ..... *passim*

Ky. Const.:

§ 50 ..... 10, 11

MISCELLANEOUS:

6 Cir. R. 206(c) 5

REPLY BRIEF FOR THE PETITIONERS

This case presents the Court with an excellent opportunity to ensure that the lower courts uniformly apply fundamental principles of Article III jurisdiction in the context of the incorporated Establishment Clause. The two distinct Questions Presented stated in the Petition directly address important aspects of the proper State taxpayer standing test, providing this Court with an ideal vehicle to complete the guidance it began in *DaimlerChrysler v. Cuno*, 546 U.S. 342 (2006) and *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007).

The Respondents do not question the importance of ensuring uniformity in Article III jurisprudence. They even concede that an acknowledged circuit split exists on the legal test used to determine State taxpayer standing in Establishment Clause cases. They attempt nonetheless to explain away this conflict. The attempt fails. The contradictory positions of the Sixth and Seventh Circuits will not change, and the resulting lack of uniformity will only spread throughout the Circuits over time.

Respondents also sidestep this Court's key precedents: those that forcefully equate State taxpayer standing and federal taxpayer standing in at least non-Establishment Clause cases; those that rigorously apply the *Flast v. Cohen*, 392 U.S. 83 (1968) "legislative enactment" nexus test in the context of federal taxpayer standing; and those that equate the First Amendment obligations of State and federal

governments. The Respondents' artful parsing of taxpayer standing jurisprudence should not dissuade the Court from promptly addressing the compelling, universal issues at the core of this suit: Article III jurisdiction, federalism, the funding of critical social services providers, and taxpayer rights. The Petition should be granted.

A. The Petition presents two compelling questions that, when answered, will ensure uniform State taxpayer standing requirements in Establishment Clause cases across all circuits.

The Questions Presented by the Petition provide the Court with far more than the opportunity to advance an "academic exercise." Petitioners' first question asks this Court to decide whether *Flast*'s "legislative enactment" nexus test applies to State taxpayers alleging Establishment Clause violations. This question addresses the Sixth Circuit's primary State taxpayer standing analysis and holding, which is premised on its own precedent in *Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501 (6th Cir. 2001), and which diverges from the Seventh Circuit's holding in *Hinrichs v. Speaker of the House of Representatives of the Indiana Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007) (rehearing *en banc* denied Jan. 14, 2008).

Petitioners' second question squarely addresses the Sixth Circuit panel's alternative State taxpayer

standing analysis and holding, which purports to apply the *Flast* "legislative enactment" nexus test to Kentucky's administration of executive branch contracts with KBHC. This second question asks:

> Does Article III confer upon the federal courts broader authority to address alleged Establishment Clause violations by State Legislatures than those same courts have to address alleged Establishment Clause violations by Congress?

(Petition, ii). The possible answers to this question lie at the intersection of the incorporated Establishment Clause and Article III's standing requirements.

Flast's two-part "legislative enactment" nexus test ensures there is a sufficient injury for a taxpayer to have Article III standing. *Flast*, 392 U.S. at 99-103. As the Petition explains in detail, the Sixth Circuit's alternative analysis fundamentally altered this test in the context of State taxpayers, and considered Kentucky legislative activity besides those "legislative enactments" that appropriate money, or expressly require or contemplate the appropriation of money, as is required for federal taxpayers under the actual *Flast* test. Petition, 22-28. Through this errant alternative holding, the Sixth Circuit effectively adopted a new and much more lenient Article III nexus test for State taxpayers that differs significantly from the *Flast* Article III "legislative enactment" injury test for federal taxpayers.

This result – two distinctly different "nexus" tests for State and federal taxpayers –illogically suggests that federal courts must necessarily treat an alleged Establishment Clause violation by a State legislature as a more tangible taxpayer injury than the same alleged violation by Congress, thereby requiring a less stringent test. If the Petition's second Question Presented is answered in the negative, the Sixth Circuit's decision to apply a more lenient nexus test, necessarily implying a greater Establishment Clause injury to State taxpayers, is clearly erroneous. Thus, the Petition's two Questions Presented invite the Court to explore both aspects of the panel's decision and ensure uniformity among the Circuits in these important Article III determinations.

B. The Questions Presented reflect significant circuit conflicts.

1. Respondents do not dispute the acknowledged conflict between the Sixth and Seventh Circuits regarding the applicability of the *Flast* "legislative enactment" nexus test to State taxpayers in Establishment Clause cases. Instead, Respondents dismiss the Seventh Circuit's analysis in *Hinrichs* and speculate that the circuit split might even resolve itself. These criticisms are groundless.

First, the positions of the Sixth and Seventh Circuits are fixed, barring a superseding decision by this Court: the lower courts denied *en banc* review both in this case and in *Hinrichs,* respectively. The

Seventh Circuit, moreover, does not reverse itself as easily as Respondents suggest. *See U.S. v. Walton*, 255 F.3d 437, 443 (7th Cir. 2001) ("[W]e are obliged to give considerable weight to our prior decisions unless and until they have been overruled or undermined by the decision of a higher court . . . [i]n addition, the fact that other circuits have come to a different conclusion . . . is not a sufficiently compelling reason . . . to prompt us to overturn [our prior holding]."); *U.S. v. Mitten*, 592 F.3d 767, 779 (7th Cir. 2010) (rejecting invitation to reconsider earlier decision in light of conflicting view by Second Circuit because *en banc* review had been denied). In addition, by its own rules, the Sixth Circuit panel opinion is binding on all subsequent panels. 6 Cir. R. 206(c).

The Seventh Circuit's State taxpayer standing analysis in *Hinrichs*, furthermore, cannot be brushed aside. It specifically addresses the applicability of *Flast* to State taxpayers, and constitutes an effective counterpoint to the Sixth Circuit's analysis below. *Hinrichs*, of course, was decided by the Seventh Circuit soon after that court had been reversed by this Court in *Hein*. The Seventh Circuit undoubtedly had a heightened awareness of this Court's strict taxpayer standing precedent when it initially decided *Hinrichs* and later declined rehearing *en banc*. If the *Hinrichs* panel did not spend inordinate effort or spill excessive ink pondering whether the *Flast* "legislative enactment" nexus test was appropriate, it is because this Court's equivalent treatment of State and federal taxpayer standing in decisions like *ASARCO Inc. v.*

Kadish, 490 U.S. 605, 613-14 (1989) and *Cuno* left little room for debate. A better question for this Court to ask (and answer) is why the Sixth Circuit went to such lengths to avoid the clear import of this Court's *Hein* and *Cuno* decisions – only to then hedge its choice with an alternative holding.[1]

This Court need not, and should not, tolerate overt conflict in the lower courts on critical questions of Article III jurisdiction on the off chance, years or decades from now, that the split might resolve itself. The only plausible result of waiting would be a widening of the conflict, as the nation's appellate courts line up behind the positions of either the Sixth or Seventh Circuits. The Petition should be granted so this conflict can be resolved now.

2. Respondents also attempt to explain away the circuit conflict created by the Sixth Circuit's alternative holding by mischaracterizing the Petitioners' argument and unreasonably limiting *Hinrichs* and *Am. United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007) to their specific facts. Respondents, however, cannot reconcile the fundamental difference

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[1] This generally recognized equivalence of State and federal taxpayers is also reflected in the decisions of the Second, Fifth, Eighth, Ninth and Eleventh Circuits cited on pages 16-17 of the Petition. The Sixth Circuit's decision to create two different standing tests for federal and State taxpayers – whether by applying two different versions of the *Flast* test or by refusing to apply *Flast* at all – conflicts with each of these decisions.

between the stringent *Flast* "legislative enactment" nexus test used in *Hinrichs* and *Prison Fellowship* and the looser nexus test crafted by the Sixth Circuit below.

The *Hinrichs* and *Prison Fellowship* decisions scrutinized whether the "legislative enactments" alleged to support taxpayer standing were the same "legislative enactments" alleged to have violated the Establishment Clause, thus arguably forming the "logical link" required by *Flast* and reaffirmed in *Hein*. *Flast*, 392 U.S. at 102; *Hein*, 551 U.S. at 602. While standing was found in *Prison Fellowship* and not in *Hinrichs*, the two decisions applied *Flast* identically and correctly.

Here, however, a fundamentally different nexus test was used by the court below to find State taxpayer standing. The Sixth Circuit required only a "nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution," not-so-subtly expanding the *Flast* "legislative enactment" test through a relaxed restatement, and effectively creating a new, quasi-*Flast* test in the context of State taxpayer standing. *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 733 (6th Cir. 2009). None of the Kentucky legislative activities on which the Respondents base their State taxpayer standing here (generic authorizing statutes, child care regulatory statutes, bricks-and-mortar appropriation, benign legislative commendation) constitutes the actual Establishment Clause violations alleged in their complaint. The Sixth Circuit's new

test severs the crucial link between the State "legislative enactment" spending taxpayer funds and the constitutional limitation on that spending – in marked contrast to *Flast*, *Hein*, *Hinrichs*, and *Prison Fellowship*. Accordingly, a serious conflict with other circuits and this Court exists on the Sixth Circuit's alternative holding as well.[2]

C. Important Article III and First Amendment considerations support applying the *Flast* "legislative enactment" nexus test to State taxpayers.

1. The *Flast* "legislative enactment" nexus test is rooted in the unique limitations the Establishment Clause places on State and federal legislative spending, not in the specific role Congress generally plays in federal spending. As a general proposition, taxpayer standing is not permitted. *Hein*, 551 U.S. at 593, 599. *Flast* created a narrow exception to this general bar as a means of determining whether a federal expenditure constitutes a distinct enough taxpayer injury to support Article III standing. To date, the only circumstance where this Court has

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[2] These conflicts strongly suggest taxpayer litigants will choose to litigate Establishment Clause claims involving the use of federal pass-through funds in the standing-friendly Sixth Circuit States. The Social Security Act applies uniformly to all States – but under the panel's test, the funds appropriated by the federal executive branch to Kentucky, Tennessee, Ohio, and Michigan will be subject to a different, more exacting level of scrutiny.

found a "legislative enactment" nexus sufficient for taxpayer standing involves violations of the Establishment Clause. *Cuno*, 547 U.S. at 347. This Court has, furthermore, repeatedly affirmed that the Establishment Clause applies equally to State and federal governments. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983). It necessarily follows that violations of that clause should cause the same level of injury, in the same way, regardless of the sovereign that commits the violation. The necessity of applying the same test to both State and federal taxpayers is primarily compelled by the Establishment Clause's equal application to both State and federal governments.

2. In the context of federal taxpayer standing, the *Flast* "legislative enactment" nexus test is consistent with the separation of powers between the three federal branches of government. The ultimate purpose of the *Flast* test, however, is not to guarantee the separation of powers, but to ensure that an Article III "case or controversy" exists. Even in the prudential areas of Article III standing, the federal judiciary's concerns have always been with the proper scope of its own authority. Judicial restraint is just as important – if not more important – in the context of protecting the political branches of the States from undue federal judicial oversight of their affairs. *See Horne v. Flores*, 129 S.Ct. 2579, 2593-94 (2009) ("Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities."). While the *Flast* test

is only applicable in federal courts, the Article III interests that test serves extend beyond Congress and the President and apply whenever the federal judiciary is called upon to review the actions of other legislative and executive bodies.

3. The practical application of *Flast* to State governments is well within the capacity of the lower federal courts. In fact, every State has a legislative branch that, like Congress, levies taxes, creates budgets, and appropriates State monies – with some level of involvement or oversight by the executive and judicial branches or even public referenda. Nonetheless, each State's legislature has the principal role in initiating the taxing and spending of taxpayer dollars. Indeed, Respondents fail to identify a single State where the executive branch, the judicial branch, or the citizenry has unilateral authority to appropriate funds from its treasury.

Respondents erroneously describe Section 50 of the Kentucky Constitution as an example of a State handing over spending authority to its citizenry (Response at 21), but that provision does nothing of the sort. Section 50 prohibits the General Assembly from incurring more than $500,000 in debt without passing a tax, subject to voter approval, to pay for it. This section simply requires the General Assembly to pass a balanced budget unless the voters say otherwise. This section does *not* transform the voters themselves into the instruments of State taxing and spending. Instead, the section requires the money to be spent by the General Assembly, the debt to be

incurred by the General Assembly, the required tax to be passed by the General Assembly, and the matter to be submitted for the voters' approval by the General Assembly. Respondents' sudden invocation of Section 50 – the first such reference in the ten years of this litigation – is a red herring, and does nothing to distinguish the manner with which Kentucky and the federal government rely on their legislatures to spend taxpayer funds.

In any event, Respondents' efforts to distinguish the applicable tests for State and federal taxpayer standing on the basis of which branch may be spending taxpayer money (*i.e.*, Congress versus State executive branches and popular referenda) are futile. *Flast* created a narrow exception to the general bar on taxpayer standing for plaintiffs who challenge a "legislative enactment" that spends public funds in a manner that directly violates the Establishment Clause. As the holdings of *Valley Forge Christian College v. Am. United for Separation of Church and State*, 454 U.S. 464 (1982), *Cuno*, and *Hein* make clear, however, public spending outside of this exception cannot yield standing. Accordingly, if challenged State spending is not the result of a "legislative enactment," the proper outcome is dismissal for lack of standing pursuant to *Flast*, not the creation of a new test that broadens *Flast*'s requirements for the sole purpose of manufacturing standing that would not otherwise exist. The scenarios envisioned by the

Respondents would by definition fall outside of *Flast*'s narrow "legislative enactment" exception.

D. The Questions Presented merit the Court's prompt review.

This case allows the Court to address important issues of Article III jurisdiction, federalism, and Establishment Clause jurisprudence. At issue is not only the power of the federal courts to review and potentially interfere in the fiscal decisions of sovereign States at the behest of taxpayers, but the scope of the First Amendment as incorporated to those States. Respondents do not dispute the importance of these issues; in fact, they filed a conditional cross-petition regarding the Sixth Circuit's application of *Flast* in the federal taxpayer context.

The Court should grant certiorari on the Petition's threshold Article III questions now, and reject the Respondents' invitation to address the merits before resolving these issues of subject matter jurisdiction. This Court's recent cases reflect a strong commitment to ensuring Article III standing is addressed and definitively resolved as a threshold inquiry. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999) (unanimously holding that federal courts must confirm subject matter jurisdiction before considering the merits of a case);[3] *Steel Co. v. Citizens*

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[3] Notably, the Court granted certiorari in *Ruhrgas* to decide a threshold jurisdictional question that was the subject of a

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for a Better Environment, 523 U.S. 83, 88-89 (1988). Further proceedings on the merits, moreover, would not affect the Respondents' standing in the slightest. If Respondents ultimately prevail on the merits, the posture of standing remains unchanged; after all, the allegations of the Complaint are already presumed to be true when conducting standing analyses. The issue of standing would still have to be litigated and resolved. If Petitioners prevail on the merits, the question of standing would be moot – but, as cases like *Ruhrgas* and *Steel Co.* make abundantly clear, subject matter jurisdiction may not simply be assumed in the meantime. It should be addressed now.

The Petition presents the sort of compelling jurisdictional questions this Court has often reviewed in recent terms, both at the behest of litigants and on its own initiative. *See, e.g., Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, May 24, 2010 (Case Nos. 09-987, 09-991) (addressing related, though not identical, State taxpayer standing questions in Establishment Clause context). This Court should not hesitate to grant certiorari and ensure Article III and the

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circuit conflict involving two circuits – specifically, a 1996 Second Circuit decision and the 1998 Fifth Circuit decision under review. 526 U.S. at 583, n.7. Thus, this Court should not be dissuaded by the Respondents' argument that the circuit conflicts in this case are too recent, or involve too few circuits, to warrant review. Indeed, in *Cuno*, this Court granted certiorari and then asked the parties to address Article III standing *sua sponte*. *Cuno*, 547 U.S. at 340.

Establishment Clause are interpreted uniformly by the lower courts.

Respectfully submitted,

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